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No. 91-1302

In The

Supreme Court of the United States

October Term, 1991

IN RE: PATRICK F. MESSING, AND NORA B. MESSING,

Debtors

ANN MOSTOLLER, TRUSTEE,

Petitioner,

vs.

PATRICK F. MESSING,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

CROSS-RESPONDENT'S BRIEF IN OPPOSITION

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CROSS-RESPONDENT'S BRIEF IN OPPOSITION

Comes the Cross-Respondent, Ann Mostoller, Trustee (hereinafter "the Trustee") and respectfully files this Brief in Opposition to the Cross-Petition for a Writ of Certiorari filed herein by the debtor, Patrick F. Messing (hereinafter "the debtor").

STATEMENT OF THE CASE

The Trustee wishes merely to point out that the debtor consistently took the position in the bankruptcy

and district courts that his ERISA-qualified pension interest was *included* in the bankruptcy estate but was exempt. The debtor argued to the Sixth Circuit that its intervening decision in *Forbes v. Lucas (In re Lucas)*, 924 F.2d 597 (6th Cir.), *cert. denied*, 111 S. Ct. 2275 (1991), entitled him to exclude the pension from his bankruptcy estate, but he still argued in the Sixth Circuit that the reasoning of *Lucas* was flawed, and that the pension interest should indeed be considered property of the estate:

> The debtor questions why Congress would have created a bankruptcy law pension plan exemption if pension plans in the first instance were excluded from property of the bankruptcy estate under 11 U.S.C. § 541(c)(2). It would appear that the drafters of 11 U.S.C. § 541 did not intend an exclusion of these benefits due to the fact that federal law allows an exemption under 11 U.S.C. § 522(d)(10)(E). The debtor asserts that an analysis of these statutes supports the better view that ERISA pension plan benefits should be included as property of the estate but exempt under 11 U.S.C. § 522(b)(2)(A).

Reply Brief of Appellants at 6, *Mostoller v. Messing*, No. 91-5087 (6th Cir. dated April 26, 1991).

It should also be noted that in this Court, Respondent asserts, "Congress intended to include ERISA-qualified pension benefits as property of the estate under 11 U.S.C. § 541(c)(2) and to permit exemption of such benefits under 11 U.S.C. § 522(b)." Cross-Petition for a Writ of Certiorari at 11.

SUMMARY OF ARGUMENT

Although both the bankruptcy court and the district court decided this case on the basis of the exemption issue raised by the debtor, the Sixth Circuit refused to rule on the issue in light of its holding that the debtor's pension interest was excluded from the bankruptcy estate. Because the Sixth Circuit failed to rule on the exemption issue, the Trustee respectfully submits that it is not appropriate for resolution at this time. Furthermore, as the debtor tacitly concedes, there is no conflict among the Circuit Courts of Appeal on this issue. *See* U.S. Sup. Ct. Rule 10.1(a).

Nevertheless, the exemption issue was correctly resolved by the district court in this case, which held that there is no nonbankruptcy federal exemption for an ERISA-qualified pension interest under 11 U.S.C. § 522(b)(2)(A). If this Court sees fit to resolve the issue, it should be decided in accordance with the district court's holding.

Finally, pursuant to U.S. Sup. Ct. Rule 13.5, the Cross-Petition should not be granted if the Petition for Certiorari is not granted.

ARGUMENT

I. Because the Sixth Circuit Refused to Rule on the Exemption Issue, Resolution of the Issue is Not Appropriate.

In its opinion, the Sixth Circuit stated, "As we find the debtor is correct in his assertion that *Lucas* is dispositive of this appeal, we do not reach the question of

whether ERISA provides an exemption for pension benefits from a bankrupt's estate." *Mostoller v. Messing*, No. 91-5087, slip op. at 2-3 (6th Cir. Sept. 24, 1991), *reprinted in* Petition for Certiorari at page App. 3. As this Court noted, "This Court usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court." *Patrick v. Burget*, 486 U.S. 94, 99 n.5 (1988) (citing *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam)). *See generally* 17 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4036, at 38-39 & n.72 (2d ed. 1988). This is not a case in which the issue pretermitted by the Court of Appeals involves the same analysis as the issue decided by the Court of Appeals, nor is the pretermitted issue so clear that it should be decided in this Court. *Cf. Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 86 n.15 (1981) ("Because the same analysis is applicable to both claims, we address the Title VII question despite the Court of Appeals' decision to avoid consideration of that question on the merits."); *Levin v. Mississippi River Fuel Corp.*, 386 U.S. 162, 170 (1967) ("[T]his point is so clear that we see no occasion for remanding the issue to the Court of Appeals for its consideration of the point, even though it be assumed that its opinion does not decide it."). *See generally* Wright, Miller & Cooper, *supra*, § 4036, at 39-40 & n.75. The exclusion and exemption issues here involve two entirely different sections of the Bankruptcy Code (sections 541 and 522) and implicate different considerations with respect to ERISA.

II. There Is No Conflict Among the Courts of Appeals on the Exemption Issue.

In his Cross-Petition for Certiorari at 6, the debtor refers to "Division Among Various Courts," but is unable to point to any conflict among the United States Courts of Appeals on the exemption issue. *See* Cross-Petition for Certiorari at 6-7. Indeed, the debtor indicates that *every* Court of Appeals that has considered the exemption issue has decided that ERISA does not create a federal non-bankruptcy exemption available to the debtor under 11 U.S.C. § 522(b)(2)(A). *See id.* at 6. The only courts cited by the debtor as taking a contrary position are bankruptcy courts. *See id.* at 7. This fact is not surprising. The Courts of Appeals that have held that ERISA-qualified pension interests are included in the bankruptcy estate have also held that ERISA does not constitute a federal non-bankruptcy exemption. *See Daniel v. Security Pacific Nat'l Bank (In re Daniel)*, 771 F.2d 1352, 1358-61 (9th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); *Lichstrahl v. Bankers Trust (In re Lichstrahl)*, 750 F.2d 1488, 1490-92 (11th Cir. 1985); *Samore v. Graham (In re Graham)*, 726 F.2d 1268, 1273-74 (8th Cir. 1984); *Goff v. Taylor (In re Goff)*, 706 F.2d 574, 582-86 (5th Cir. 1983). The Courts of Appeals that have held that ERISA-qualified pension interests are excluded from the bankruptcy estate have quite logically refused to address the exemption issue, since property cannot be exempted from the estate unless it first becomes property of the estate. *See Shumate v. Patterson*, 943 F.2d 362, 365-66 (4th Cir. 1991), *cert. granted*, 60 U.S.L.W. 3492 (U.S. Jan. 21, 1992) (No. 91-913). *But cf. Gladwell v. Harline (In re Harline)*, 950 F.2d 608 (10th Cir. 1991) (exemption issue apparently not raised by debtor); *Velis v. Kardanis*, 949 F.2d 78,

83 (3d Cir. 1991) (debtor did not challenge on appeal district court's finding of unavailability of exemption under § 522(d)(10)(E); question of federal nonbankruptcy exemption under § 522(b)(2)(A) not at issue because New Jersey has not opted out of federal exemption scheme); *Anderson v. Raine (In re Moore)*, 907 F.2d 1476 (4th Cir. 1990) (in context of turnover action by Trustee against plan administrator, exemption issue apparently not raised); *Forbes v. Lucas (In re Lucas)*, 924 F.2d 597, 598-99 (6th Cir.) (debtor claimed exemption under Tennessee law; bankruptcy court holding that exemption not available apparently not challenged on appeal), *cert. denied*, 111 S. Ct. 2275 (1991). Thus, the exemption issue raised by the debtor here has created no conflict in the Courts of Appeals. *See* U.S. Sup. Ct. Rule 10.1(a).

The debtor is correct that, if this Court reverses the Sixth Circuit, the status of his pension will not be completely resolved without a ruiing on the exemption issue. However, the proper forum for that determination is the Sixth Circuit on remand. It may well be that, squarely presented with the exemption issue, the Courts of Appeals that have pretermitted the issue will find themselves in agreement with those which have examined it. In the absence of a conflict among the Circuits, any decision by this Court on the exemption issue might ultimately prove unnecessary. Therefore, the Cross-Petition for Certiorari should be denied.

III. The District Court Correctly Held that ERISA Does Not Establish a Federal Nonbankruptcy Exemption Available to Debtors Under Bankruptcy Code § 522(b)(2)(A).

If this Court does consider the exemption issue, the Trustee submits, the issue should be decided in accordance with the district court's ruling in this case. The district court, reversing the bankruptcy court, held that ERISA does not create a federal nonbankruptcy exemption available to debtors under 11 U.S.C. § 522(b)(2)(A). *Mostoller v. Messing*, No. CIV-3-90-601, mem. op. (E.D. Tenn. Dec. 13, 1990), *reprinted in* Petition for Certiorari at pages App. 7-13.

The exemption issue is whether the debtor's ERISA-qualified pension interest constitutes "property that is exempt under Federal law, other than subsection (d) of this section." 11 U.S.C. § 522(b)(2)(A). The extreme minority view espoused by the debtor in his Cross-Petition holds that the anti-assignment, anti-alienation provisions required by 29 U.S.C. § 1056(d)(1) and 26 U.S.C. § 401(a)(13) render ERISA-qualified pension interests "exempt under Federal law." However, the majority and better-reasoned view is that ERISA does not constitute a federal exemption statute.

Courts taking the majority view have focused primarily on two factors. First, because of the vague and ambiguous nature of the term "exempt under Federal law," the courts have looked to the legislative history for evidence of congressional intent. Both the House and Senate Reports contain the following passage in the analysis of § 522:

> [S]ome of the items that may be exempted under other Federal laws include:
> - Foreign Service Retirement and Disability payments, 22 U.S.C. 1104;
> - Social security payments, 42 U.S.C. 407;
> - Injury or death compensation payments from war risk hazards, 42 U.S.C. 1717;
> - Wages of fishermen, seamen, and apprentices, 46 U.S.C. 601;
> - Civil service retirement benefits, 5 U.S.C. 729, 2265;
> - Longshoremen's and Harbor Workers' Compensation Act death and disability benefits, 33 U.S.C. 916;
> - Railroad Retirement Act annuities and pensions, 45 U.S.C. 228(L);
> - Veterans benefits, 45 U.S.C. 352(E);
> - Special pensions paid to winners of the Congressional Medal of Honor, 38 U.S.C. 3101; and
> - Federal homestead lands on debts contracted before issuance of the patent, 43 U.S.C. 175.

H. Rep. No. 595, 95th Cong., 1st Sess. 360 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6316; S. Rep. No. 989, 95th Cong., 2d Sess. 75 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5861. Courts taking the majority view have quite properly viewed this list as illustrative only and not exhaustive. *See In re Daniel*, 771 F.2d at 1360.

More importantly, however, these courts have noted "a significant, rational, and demonstrated difference between the federal exemptions accorded certain funds identified by Congress under Section 522(b)(2)(A) and ERISA pension plans." *In re Alagna*, 107 B.R. 301, 315 (Bankr. D. Colo. 1989). ERISA pension benefits are unlike other property interests, such as Social Security payments and Veterans' benefits, which Congress has specifically chosen to exclude or exempt from the estate. *In re Daniel*, 771 F.2d at 1360-61; *In re Alagna*, 107 B.R. at 315 n.38. Unlike ERISA, other federal laws, such as the Social Security Act, 42 U.S.C. § 407, expressly exclude Social Security benefits from the estate and expressly preempt other federal laws:

> (a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and *none of the moneys* paid or payable or rights existing under this subchapter *shall be subject to* execution, levy, attachment, garnishment, or other legal process, or to *the operation of any bankruptcy or insolvency law*.
>
> (b) *No other provision* of law, enacted before, on, or after April 20, 1983, *may be construed to* limit, *supersede*, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.

42 U.S.C. § 407 (emphasis added).

Also, by way of example, unlike ERISA's anti-alienation provisions discussed above, other federal laws expressly constitute federal nonbankruptcy exemptions.

For instance, the Veterans' Benefits Act, at 38 U.S.C.S. § 5301(a) (Lawyers Coop. Supp. Feb. 1992), provides as follows:

> (a) Payments of benefits due or to become due under any law administered by the Secretary . . . shall be exempt. . . .

ERISA benefits may have a drastic practical difference from federal governmental benefits such as Social Security or Veterans' benefits. The latter are, by their nature, periodic and in small sums determined by governmental formula, or they serve as an indemnification for medical expenses, and they are beyond the recipient's control. On the other hand, ERISA benefits may be received in enormous lump sums and may be wholly within the debtor's control. For instance, but for the Fifth, Eighth and Ninth Circuits, the debtors in *Goff*, *Graham*, and *Daniel* would have taken the sums of $90,000.00, $150,000.00, and $98,000.00, to the prejudice of their creditors. *In re Goff*, 706 F.2d at 577; *In re Graham*, 726 F.2d at 1269; and *In re Daniel*, 771 F.2d at 1354. Thus, as illustrated above, the exemption for property such as Social Security benefits and Veterans' benefits provides no analogy for excluding or exempting ERISA pension benefits. The contrast in statutory language, as well as the legislative history cited above, indicate that Congress intended otherwise.

Likewise, the debtor mistakenly calls upon the Internal Revenue Code and the Internal Revenue Service for the creation of a separate federal exemption for ERISA benefits independent of the Bankruptcy Code. The extreme minority view advocated by the debtor fails to take proper account of the relationship between ERISA's

labor law provisions and its Internal Revenue Code provisions. ERISA's anti-alienation and anti-assignment provisions are codified at 29 U.S.C. § 1056(d)(1) [labor] and 26 U.S.C. § 401(a)(13) [Internal Revenue Code], *reprinted in* Cross-Petition for Certiorari, Appendix A, at 2a-4a. The plain language of ERISA's anti-assignment and anti-alienation provisions applies only to the requisite content of ERISA plans for favorable tax treatment. The language of these provisions creates no exemption. Likewise, the Department of Treasury has issued no regulations concerning ERISA's anti-assignment or anti-alienation provisions except as to the requisite content of ERISA plans for favorable tax treatment. Any contrary treasury regulation would run afoul of ERISA's declaration that it does not serve to "modify, invalidate, impair, or supersede" the provisions of other federal laws, 29 U.S.C. § 1144(d), and obviously would run afoul of Bankruptcy Code § 541(a). The Department of Treasury lacks any authority to issue a regulation that would "modify, invalidate, impair, or supersede" the provisions of other federal laws.

Respecting ERISA plans, the IRS' capability goes no further than the tax qualification of such plans. The tax qualification of ERISA deals with amendments or additions to the Internal Revenue Code which impose the requirements that a plan must meet in order to provide the tax advantages and benefits of a qualified plan. Title I of ERISA contains its labor law provisions. The preemption provisions of ERISA are set forth at ERISA § 514(a) [29 U.S.C. § 1144(a)] as part of the labor law provisions of ERISA in Title I. Conversely, the tax provisions of Title II

of ERISA are not encompassed by the preemption provision contained in Title I of ERISA. *Compare* Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, Title I – Protection of Employee Benefit Rights, §§ 1-514, 88 Stat. 832-97, *with id.*, Title II – Amendments to the Internal Revenue Code Relating to Retirement Plans, secs. 1001-2007, 88 Stat. 898-994. The language of ERISA § 514(a) as enacted makes it clear that the preemptive scope of ERISA extends only to Titles I and IV ("Plan Termination Insurance") of ERISA:

> Sec. 514. (a) Except as provided in subsection (b) of this section, the provisions of this title [Title I] and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 U.S.C. § 1003(a)] and not exempt under section 4(b) [29 U.S.C. § 1003(b)]. . . .

ERISA § 514(a), Pub. L. No. 93-406, 88 Stat. 832, 897. The omission of any reference in this section to Title II of ERISA ("Amendments to the Internal Revenue Code Relating to Retirement Plans") clearly indicates Congress' intent that the preemptive scope of ERISA pertains only to its labor law provisions and not its tax provisions.[1]

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[1] "Title I of ERISA, Pub. L. No. 93-406, 88 Stat. 829 (codified at title 29 of the United States Code), embodies the labor law provisions of ERISA governing, inter alia, reporting and disclosure, participation and vesting, funding, fiduciary responsibility, and administration and enforcement. Title II of ERISA, Pub. L. No. 93-406 (codified in various sections of Title 26 of the United States Code), deals with amendments or

(Continued on following page)

Regardless, the IRS could hardly regulate or rule away ERISA's prescription that its provisions shall not "be construed to alter, amend, modify, invalidate, impair or supersede" other federal laws such as Bankruptcy Code § 541(a). 29 U.S.C. § 1144(d). Moreover, any contrary private rulings of the IRS are not binding on this Court and may not be used or cited as precedent. 26 U.S.C. § 6110(j)(3); *Fogler v. Flindall (In re Flindall)*, 105 B.R. 32, 41 (Bankr. D. Ariz. 1989).

Contrary to the debtor's assertions, neither *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988), nor *Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 395 (1990), recognizes ERISA as a federal exemption statute. The Court in *Mackey* simply held that ERISA preempts "any and all *State* laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 486 U.S. at 829 (emphasis added). The Court in *Guidry* simply held that ERISA's anti-alienation provision is not subject to the remedial provisions of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) because giving precedent to ERISA would not modify, impair, or supersede the LMRDA. 493 U.S. at 374-75. Neither of these cases arose in the bankruptcy context, and neither involved the situation where, as here, recognizing the ERISA anti-alienation provision as a

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additions to the Internal Revenue Code which impose requirements a plan must meet in order to provide the tax advantages and benefits of a qualified plan. The provisions of title II of ERISA are not embodied within the preemptive scope of ERISA § 514(a) (29 U.S.C.A. § 1144(a) (West 1985)). . . . " *In re Martin*, 102 B.R. 639, 643 n.11 (Bankr. E.D. Tenn. 1989).

federal exemption would modify, impair, or supersede sections 541(a) and 522(d)(10)(E) of the Bankruptcy Code.

CONCLUSION

For the foregoing reasons, the Cross-Petition for a Writ of Certiorari should be denied.

March 11, 1992.

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